

WILLIAM A. MUNDELL
CHAIRMAN
JIM IRVIN
COMMISSIONER
MARC SPITZER
COMMISSIONER



BRIAN C. McNEIL
EXECUTIVE SECRETARY

ARIZONA CORPORATION COMMISSION

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ALSTON & BROWN

DATE: April 29, 2002

DOCKET NOS: T-03601A-01-0965

TO ALL PARTIES:

Enclosed please find the recommendation of Administrative Law Judge Teena Wolfe. The recommendation has been filed in the form of an Order on:

XO COMMUNICATIONS, INC.
(AFFILIATED INTERESTS RULES/WAIVER)

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Administrative Law Judge by filing an original and ten (10) copies of the exceptions with the Commission's Docket Control at the address listed below by 4:00 p.m. on or before:

MAY 8, 2002

The enclosed is NOT an order of the Commission, but a recommendation of the Administrative Law Judge to the Commissioners. Consideration of this matter has tentatively been scheduled for the Commission's Working Session and Open Meeting to be held on:

MAY 14 AND 15, 2002

For more information, you may contact Docket Control at (602)542-3477 or the Hearing Division at (602)542-4250.

Arizona Corporation Commission

DOCKETED

APR 29 2002



BRIAN C. McNEIL
EXECUTIVE SECRETARY

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 WILLIAM A. MUNDELL
CHAIRMAN

3 JIM IRVIN
COMMISSIONER

4 MARC SPITZER
COMMISSIONER

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6 IN THE MATTER OF THE APPLICATION OF XO
COMMUNICATIONS, INC. FOR A GENERAL
7 WAIVER OF THE RULES GOVERNING PUBLIC
UTILITY HOLDING COMPANIES AND
8 AFFILIATED INTERESTS.

DOCKET NO. T-03601A-01-0965

DECISION NO. _____

9 **ORDER**

10 Open Meeting
May 14 and 15, 2002
Phoenix, Arizona

11 **BY THE COMMISSION:**

12 On December 11, 2001, XO Communications, Inc. ("XO") filed with the Arizona Corporation
13 Commission ("Commission") an application for a general waiver of application of the Commission's
14 Public Utility Holding Companies and Affiliated Interests Rules, A.A.C. R14-2-801 et seq. ("Rules")
15 to any future reorganization involving XO or an XO affiliate.

17 On March 5, 2002, the Commission's Utilities Division Staff ("Staff") filed a Staff Report in
18 this docket recommending that the Commission approve a limited waiver of the Rules without a
19 hearing.

20 * * * * *

21
22 Having considered the entire record herein and being fully advised in the premises, the
23 Commission finds, concludes, and orders that:

24 **FINDINGS OF FACT**

25 1. XO is the parent company of XO Arizona, Inc. ("XO Arizona") and XO Long
26 Distance Services, Inc. ("XO Long Distance").

27 2. XO Arizona is an Arizona public service corporation authorized to provide
28

1 competitive facilities-based and resold intraLATA toll services and intrastate interexchange
2 telecommunications services in Arizona. XO Arizona provides these services pursuant a Certificate
3 of Convenience and Necessity ("CC&N") granted to NEXTLINK Arizona, Inc. in Decision No.
4 61373 (January 29, 1999). NEXTLINK Arizona, Inc. changed its name to XO Arizona, Inc. on
5 January 17, 2000. XO Arizona is classified as a Class A Utility under Commission Rules.

6 3. XO Long Distance is an Arizona public service corporation authorized to provide
7 interexchange service in Arizona. XO Long Distance provides these services pursuant to a CC&N
8 granted to NEXTLINK Long Distance Services, Inc. in Commission Decision No. 62770 (August 2,
9 2000). NEXTLINK Long Distance Services, Inc. changed its name to XO Long Distance Services,
10 Inc. on October 18, 2000.

12 4. On December 11, 2001, XO filed with the Commission an application for a general
13 waiver of application of the Rules to any future reorganization involving XO or an XO affiliate.

14 5. In its filing, XO requests that if the Commission orders a limited waiver, that it use
15 Commission Decision No. 58258 (April 8, 1993), which granted a limited waiver to AT&T
16 Communications of the Mountain States, Inc., as a guide, instead of Commission Decision No.
17 58087, which granted a limited waiver to US WEST Communications, Inc. XO states that a number
18 of the conditions in Decision No. 58087 are designed to address issues that could arise should a
19 monopoly provider enter into an affiliate transaction, and that those conditions are not meaningful
20 when applied to competitive local exchange carriers.

22 6. In support of its application, XO states that in the coming years, XO will enter into
23 transactions that would fall under the definition of "reorganizations" under the Rules that will have
24 no impact on Arizona operations, and that the sheer size of XO dictates that the transactions (*e.g.* new
25 investment, debt acquisition, mergers, acquisitions) will occur outside Arizona and will not affect
26 Arizona customers. XO asserts that these transactions will not result in any fundamental change in
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1 the affiliate entity that operates in Arizona and should not be subject to a Commission approval
2 requirement.

3 7. XO also states in support of its application that it does not exercise monopoly power
4 over a captive service territory or guaranteed revenue base. XO further asserts that because XO faces
5 competition in all of the services it provides to Arizona customers, there exists virtually no incentive
6 or opportunity for XO to attempt to extract from customers unduly high or above-market prices that
7 could be used to subsidize unregulated, affiliated interests, and that the market effectively provides a
8 natural safeguard against the improper exploitation of telecommunication service profits by XO.
9

10 8. On March 5, 2002, Staff filed a Staff Report on XO's application. In the Staff Report,
11 Staff recommended that the Commission approve the partial waiver of the Rules without a hearing.

12 9. In the Staff Report, Staff also made the following recommendations:

- 13 a. that the Commission should grant XO Arizona a waiver from A.A.C. R14-2-
14 803 unless organization or reorganization could directly or indirectly result in
15 or cause an increase in XO Arizona's maximum rate on file with the
Commission for any competitive service;
- 16 b. that the Commission should grant XO Arizona a waiver from A.A.C. R14-2-
17 804(B), (C), and (D), except for transactions that could directly or indirectly
18 result in or cause an increase in XO Arizona's maximum rate on file with the
Commission for any competitive service; and
- 19 c. that the Commission grant XO Arizona a waiver of A.A.C. R14-2-805 unless
20 diversification plans could directly or indirectly result in or cause an increase
21 in XO Arizona's maximum rate on file with the Commission for any
competitive service.

22 10. As competitive telecommunications carriers in Arizona, XO's affiliates compete
23 directly with numerous other competitive interexchange carriers.

24 11. Although the competitive nature of the telecommunications market may reduce the need
25 for Commission oversight over XO's affiliate relationships to the extent contemplated by the Rules, it
26 is not reasonable for the Commission to grant XO a complete waiver of the Rules at this time.

27 12. It is reasonable to grant to XO and its affiliates a partial waiver of the Rules in
28 accordance with Staff's recommendations as set forth in Findings of Fact Nos. 8 and 9 above, subject

1 to the condition that XO must notify the Commission, and file in advance for approval of, any
2 proposed organization or reorganization, transaction, or diversification plan of XO or its affiliates that
3 could directly or indirectly result in or cause an increase in their maximum rates on file with the
4 Commission for any competitive service.

5 CONCLUSIONS OF LAW

6 1. XO Arizona and XO Long Distance are public service corporations within the
7 meaning of Article 15 of the Arizona Constitution and Title 40 of the Arizona Revised Statutes.

8 2. Absent a waiver of A.A.C. R14-2-803, XO and its affiliates would be required to
9 provide notice to the Commission for every internal reorganization they undertake.

10 3. The Commission has jurisdiction over this matter and has authority to issue this Order
11 and pursuant to A.A.C. R14-2-801 *et seq.*

12 4. XO and its affiliates should be granted a limited waiver of the Rules in accordance
13 with Staff's recommendations as set forth in Findings of Fact Nos. 8 and 9 above, subject to the
14 condition that XO must notify the Commission, and file in advance for approval of, any proposed
15 organization or reorganization, transaction, or diversification plan of XO or its affiliates that could
16 directly or indirectly result in or cause an increase in their maximum rates on file with the
17 Commission for any competitive service.

18 ORDER

19 IT IS THEREFORE ORDERED that the application of XO Communications, Inc. for a
20 general waiver of application of the Commission's Affiliated Interests Rules to any future
21 reorganization involving XO Communications, Inc. or an XO Communications, Inc. affiliate is
22 hereby denied.

23 IT IS FURTHER ORDERED that XO Communications, Inc. and its affiliates shall be
24 required to file a notice of intent to enter into the transactions listed in A.A.C. R14-2-803 only when
25 an organization or reorganization could directly or indirectly result in or cause an increase in their
26 maximum rates on file with the Commission for any competitive service.

27 IT IS FURTHER ORDERED that XO Communications, Inc. and its affiliates are hereby
28 granted a waiver from A.A.C. R14-2-804(B), (C), and (D), except for those transactions that could

1 directly or indirectly result in or cause an increase in their maximum rates on file with the
2 Commission for any competitive service.

3 IT IS FURTHER ORDERED that XO Communications, Inc. and its affiliates are hereby
4 granted a waiver from A.A.C. R14-2-805 except for those diversification plans that could directly or
5 indirectly result in or cause an increase in their maximum rates on file with the Commission for any
6 competitive service.

7 IT IS FURTHER ORDERED that XO Communications, Inc. and its affiliates are granted the
8 above-described waivers subject to the condition that they must notify the Commission, and file in
9 advance for approval of, any proposed organization or reorganization, transaction, or diversification
10 plan that could directly or indirectly result in or cause an increase in their maximum rates on file with
11 the Commission for any competitive service.

12 IT IS FURTHER ORDERED that this Decision shall become effective immediately.

13 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

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16 CHAIRMAN COMMISSIONER COMMISSIONER

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IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive
Secretary of the Arizona Corporation Commission, have
hereunto set my hand and caused the official seal of the
Commission to be affixed at the Capitol, in the City of Phoenix,
this ____ day of _____, 2002.

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BRIAN C. McNEIL
EXECUTIVE SECRETARY

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DISSENT _____
TW:mlj

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1 SERVICE LIST FOR: XO COMMUNICATIONS, INC.

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